UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-1231

TIM FOLEY PLUMBING SERVICE, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

INDIANA STATE PIPE TRADES ASSOCIATION
AND U.A. LOCAL 661, AFL-CIO

Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The National Labor Relations Board ("the Board") had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"). This Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Board's Supplemental Decision and Order issued on May 31, 2002, and is reported at 337 NLRB No. 88. (A 20-29.)[1] The Board's order is a final order under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

Tim Foley Plumbing Service, Inc. ("the Company") filed its petition for review of the Board's order on July 16, 2002. The Board filed its cross-application for enforcement on August 26, 2002. Both were timely filed, as the Act places no time limitation on filing for review or enforcement of Board orders. The charging party below, the Indiana State Pipe Trades Association and U.A. Local 661, AFL-CIO ("the Union"), intervened in this case.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by threatening employees with various reprisals if they selected the Union as their bargaining representative,

interrogating employees about union activities, and changing its hiring policies immediately after six union members applied for employment.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by refusing to consider or hire six applicants because of their union affiliation.

3. Whether, because the Board chose to direct a second election, rather than issue a bargaining order, the Court may completely disregard the Company's assertion that the Board erred by issuing a bargaining order.

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are contained in an addendum to this brief.

STATEMENT OF THE CASE

Acting on several charges filed by the Union, the Board's General Counsel issued a consolidated complaint, alleging that the Company had engaged in numerous acts that violated Section 8(a)(1) and (3) of the Act (29 U.S. C. § 158(a)(1) and (3)). (A 12; 390-402.) The Board subsequently consolidated the unfair labor practice proceeding with objections that were filed by the Union to an election held in a unit of the Company's plumbers. (A 12.) After a hearing, an

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[1] "A" refers to the record materials contained in the deferred appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

administrative law judge issued a decision and recommended order on August 3, 1998, in which he found that the Company had engaged in most of the alleged unfair labor practices. Those unfair labor practices included unlawfully interrogating employees about union activities, threatening employees with plant closure, informing employees that it would never sign a collective-bargaining agreement with the Union, changing its hiring polices immediately after six union members applied for employment, and refusing to consider for hire the six union members who applied for employment. (A 18.) The judge left to a compliance proceeding the ultimate determination as to whether the Company would have hired the union members. (A 18.) The judge also found that the Company's violations warranted setting aside the election. The judge directed a second election, finding that the unlawful conduct did not warrant a bargaining order. (A 18-19.)

Both parties filed exceptions to the judge's decision with the Board. (A 10; 7-9.) On December 15, 2000, the Board (Chairman Truesdale and Members Fox and Liebman) affirmed the judge's rulings, findings, and conclusions that the Company engaged in a variety of coercive conduct, and that it unlawfully refused to consider the union-affiliated job applicants for employment. (A 10-11 and n.4.) In affirming the judge's findings that company employee Richey Harper engaged in a variety of coercive conduct, the Board did not pass on the judge's finding that

employee Harper's unlawful conduct was imputable to the Company because he was a supervisor. Instead, the Board found that Richey's conduct was imputable to the Company because he was a company agent. (A 10.) In addition, the Board found that two conversations between Richey and company employees also violated the Act, noting that the judge's failure to discuss credited testimony relating to the two conversations was inadvertent. (A 11 n.6.) The Board also found, contrary to the judge, that the Company threatened reprisals against employees who wore union T-shirts. (A 11.)

The Board remanded the case to the judge for him to analyze the refusal-to-hire allegation under the framework set forth in *FES,* 331 NLRB 9 (2000), *enf*., 301 F.3d 83 (3d Cir. 2002). *FES*, which issued subsequent to the judge's decision, requires the Board, in most circumstances, to consider the refusal to hire allegation in the initial unfair labor practice proceeding rather than in the compliance proceeding. (A 10.) The Board also directed the judge, in light of his findings on remand, to reconsider whether a second election or a bargaining order was the appropriate remedy. (A 11.)

On remand, the administrative law judge issued a supplemental decision on March 26, 2001. The judge found, pursuant to *FES,* that the Company unlawfully refused to hire the six union members who applied for employment. (A 28.) The judge found, however, that a second election, rather than a bargaining order, was still the appropriate remedy. (A 27.) The Company and the General Counsel both filed exceptions to the judge's supplemental decision. (General Counsel and Company Exceptions.) On May 31, 2002, the Board (Chairman Hurtgen and Members Liebman and Bartlett) issued a Supplemental Decision and Order adopting the judge's supplemental decision. (A 20-22.) As noted above, the Company initiated these proceedings with a petition to review the Board's order, followed by the Board's cross-application for enforcement of its order.

The facts supporting the Board's order are summarized directly below; the Board's conclusions and order are described immediately thereafter.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Union's Organizing Campaign

The Company, headquartered in Muncie, Indiana, performs plumbing installation and maintenance for residential and commercial projects throughout Indiana. (A 12; 32-35, 39, 398 par. 2(a), 405 par. 2(a).) In January 1997, the Union began a campaign to organize the Company's 19 plumbing employees,

including approximately 4 journeymen, 12 apprentices, and 3 helpers. (A 23; 33, 88-89, 127-30, 578-79.) Between January and August, 10 of the Company's plumbing employees signed union authorization cards. (A 15, 23; 89-91, 164-65, 187-90, 207-08, 224-26, 560-63, 568-75, 580-81, 584-89.)

In June, Union Business Manager Ken Lewis met twice with Tim Foley, the Company's owner and its president, to ask Foley to enter into a collective-bargaining relationship with the Union. Foley declined the offers. (A 23; 32, 69, 88.) By early August, President Foley was aware of the Union's organizing campaign. (A 23; 69.) On August 12, the Union filed a petition with the Board seeking an election to represent the Company's plumbing employees. (A 23; 68-69. 495-96.)

B. Company Employee Harper Interrogates and Threatens Employees with Various Reprisals

During the first few weeks after the Union filed its election petition, Richey Harper, a journeyman plumber who served as an "extension" of Company President Foley on jobsites, and was in charge of several of the Company's jobsites, discussed the Union with apprentice plumbers Chris Brown and Scott Mitchell. (A 10, 25, 26; 39-41, 108-09, 146-49, 150-51, 165-68, 179, 191-95.) During a phone call to Mitchell, Harper stated that President Foley would not sign a collective-bargaining agreement with the Union, but would instead "close" and

"re-open under another name." Harper further stated that Foley would "be looking out for the ones that vote no . . . ." (A 25; 192.) Harper also asked Mitchell if he knew how other employees would vote. Mitchell replied that he did not know. (A 25; 193.)

While traveling to a jobsite, Harper told Mitchell and Brown that if the employees voted for union representation the apprentices would receive approximately $7 perhour, $5 less than Brown was currently making, and $1.50 less than Mitchell was currently making. (A 25; 166-68, 193-95, 418-19.) Harper also told Mitchell and Brown that they would have to supply their own tools, and drive to work in their own trucks if the Union won the election. (A 25; 167-68, 194-95.) After arriving at the jobsite, Harper asked how they would vote in the election. (A 25; 167-68.) Mitchell discussed Harper's statements with other bargaining unit employees. (A 25; 193.)

C. The Company's Hiring Policy; Six Union Members Apply for Jobs

President Foley was solely responsible for the Company's hiring. (A 77.) As of August 22, Foley generally hired all of his employees through referrals or unsolicited applications. (A 77-78.) According to the Company's personnel manual, the Company hired employees based on "ability, competence, experience, and satisfactory prior employment references." (A 78-79, 509.) President Foley

maintained an unwritten rule of keeping applications current for 30 days. (A 24; 80-81.)

On August 22, six members of the Union--Gregg Slentz, Daniel "Steve" Small, Stacy Stockton, Denny Smith, James Salmon, and William Fortwengler, each of whom was a journeymen licensed plumber--went to the Company's office around noon to apply for a job. (A 23; 101-02, 103-04, 231-33, 255-56, 264-66, 273-74, 293-95, 302-05, 315-17.) The union members, accompanied by Union Business Agent Jack Neal, Jr., and organizer Tony Bane, wore union T-shirts and/or hats. (A 23; 87-88, 105, 233, 256, 295, 305.) They asked Samantha Stauffer, the Company's receptionist, for job applications. Stauffer, who had started her job a few days earlier, did not know where the applications were, and had to leave the immediate area to consult with Office Manager Michelle Miller. Stauffer returned with Miller, who provided applications to the six plumbers. At least one of the plumbers asked Miller and Stauffer about the application process. (A 23; 232-35, 256-58, 266-67, 295-96, 305-06, 318-19, 323-28, 362-66.)

The six applicants wrote "voluntary union organizer" on the top of their employment applications. (A 23; 537-55.) All of the applicants also wrote that they were journeymen licensed plumbers and that they had received their training through the Union. (A 23; 537-55.) Except for applicant Slentz, who left his employment application blank with respect to the desired job and salary, the

applicants sought jobs as either "plumbers" (Small, Stockton, Salmon) or "journeymen plumbers" (Smith, Fortwengler), and indicated that they were open to any salary. (A 23; 537-55.) The union members left the Company's premises after receiving copies of their applications. (A 23; 235, 258, 328.)

D. The Company Stops Accepting Direct Employment Applications; the Company Uses Temporary Employment Agencies and Subcontractors for Its Employment Needs

Office Manager Miller gave the applications from the six union members to President Foley when he returned from lunch. (A 24; 144.) Foley did not contact, or hire, any of the union applicants. (A 24; 82, 86.) After Foley received the applications, he directed Miller to contact Stephen LePage, an employee of the consulting company hired by Foley to advise and assist him in his campaign against the Union. (A 24; 72-73, 333-34, 371-72.) On August 23, after consulting with LePage, the Company posted a notice on its door that stated, "due to the recent increased interest for job applications, we are no longer accepting applications at this office. All interested job applicants may register [as of August 25] at: Indiana Workforce Development" ("Indiana Workforce") located in Muncie, Indiana. (A 24; 83-84, 121-22, 373-74, 556-57.)

Indiana Workforce is a State agency that administers Indiana's unemployment insurance system, and provides a labor exchange for employers and prospective employees. The agency cannot refer applicants to a prospective

employer unless the employer has placed a job order with the agency. (A 24; 240-42, 250-51, 254.) The Company placed its first job order with the agency on November 17. The job order sought journeymen plumbers. (A 24; 243-47, 250-53, 584-85.)

In the meantime, the Company needed plumbers to assist it with approximately 10 to 12 projects, including plumbing installation at motels, assisted living facilities, and apartment complexes. (A 24; 37-38, 52-54.) To fulfill those staffing needs within the 30-day period that the union applications were still valid, the Company utilized the services of temporary employment agencies to employ approximately 4 journeymen plumbers and 10 apprentice plumbers/helpers. (A 24; 594-95.)[2] The Company also subcontracted work to two plumbing contractors for work performed between approximately August 1997 and February 1998. (A 24; 124-26.)

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[2] Seven other apprentice plumbers/helpers worked for less than 1 week in September. (A 594-95.)

E. The Company and the Union Enter into a Stipulated Election Agreement; the Company Threatens Employees

On August 28, representatives of the Company and the Union met at the Board's offices in Indianapolis to participate in a representation hearing. Company employees Bob Baker and Richard Howard wore union T-shirts to the hearing. (A 25; 209-10, 226-28.) On August 29, the parties entered into a stipulated election agreement to hold an election on September 18 in a unit comprising the Company's plumbers, apprentice plumbers, and plumber helpers. Employees on the Company's payroll as of August 24 were eligible to vote. (A 25; 68, 497-500.)

Shortly before the election, President Foley held three meetings at the Company's headquarters with all of its employees in an effort to convince the plumbers to vote against union representation. (A 25; 71-77, 171.) During the last meeting, President Foley introduced Jeffrey Payne, a friend and owner of an electrical contractor that was often used by the Company as a subcontractor. Payne had accompanied Foley to the August representation hearing. (A 25; 61-62, 71-77, 131-32, 172, 197-98, 227-29, 340-41.) Payne discussed his prior experience as an employee trying to organize an employer, and his current expertise as an employer who had faced several union campaigns. During Payne's address, he recalled having seen two company employees wearing union T-shirts

at the representation hearing, and stated that they were "silly" for letting the Union dress them up in union T-shirts and "mak[e] targets out of [them]." (A 25; 230.)

On approximately September 13, journeyman plumber Harper visited apprentice plumber Brown at his home. Harper asked how Brown and other employees would vote. (A 25; 169-70.) On approximately September 15, Harper initiated a conversation with plumber's helper Howard at a jobsite. Harper told Howard that President Foley would "never sign a contract," and that Foley had told him that "[Foley's] options were to sell off the trucks and tools, [and to] shut down the business." (A 25; 212-13.) Harper also told Howard that he would never receive the wages that the Union would ask for, and that he would be "lucky" to work 6 months a year. (A 25; 212-13.) Howard told two or three employees about Harper's statements. (A 25; 213.)

Also, on approximately September 15, President Foley confronted Howard with his timecard. Foley and Howard argued as to whether Howard could receive pay for the time spent driving a company vehicle to a jobsite. Foley told Howard that in a "union setting" employees would have to drive their own vehicles to a jobsite and would not receive pay for travel time. (A 12, 25 and n.7; 380-81, 384-87.) Howard told three other company employees about Foley's statement. (A 25 n.6; 211.)

F. The Union Loses the Election; the Company Resumes Direct Hiring of Employees

The Union lost the election held on September 18 by a vote of 10 to 9. (A 25.) Over the next 2 months, the Company used temporary employment agencies to staff 11 positions--approximately 2 journeymen plumbers and 9 plumber apprentices/helpers. (A 594-95.)

Pursuant to the job order placed by the Company on November 17 with Indiana Workforce, the Company hired three journeymen plumbers between January and April 1998. (A 24; 247-49.) In addition, in approximately late January 1998, the Company hired journeyman plumber Stahl, who previously had been employed by it through a temporary agency. (A 24; 118-19, 594-95.) Finally, between November 1997 and February 1998, the Company directly hired two journeymen plumbers and two plumber's helpers. (A 111-15.)

II. THE BOARD'S SUPPLEMENTAL DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

On the foregoing facts, the Board (Chairman Hurtgen and Members Liebman and Bartlett) found, in agreement with the administrative law judge, that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by refusing to hire six job applicants because of their union affiliation. (A 21.) The Board noted that the judge's findings that the Company had unlawfully threatened and interrogated employees, changed its hiring policy, and refused to

consider the union-affiliated applicants, were resolved by the Board's Decision and Order, and were therefore res judicata for purposes of the remand proceeding. (A 20 and n.3.) The Board also agreed with the judge that the direction of a second election, rather than a bargaining order, was the appropriate remedy. (A 21.)

The Board's order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, coercing, or restraining employees in the exercise of the rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157). (A 28.) Affirmatively, the order directs the Company to instate the six union-affiliated job applicants to a job for which they applied, or to a substantially equivalent position, and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. (A 28.) The Board's order also requires the Company to post an appropriate notice to employees. (A 28.)

SUMMARY OF ARGUMENT

Faced with a union organizing campaign and a contemporaneous attempt by members of the Union to seek employment, the Company responded by engaging in a litany of unlawful conduct, including numerous interrogations and threats, and a refusal to consider or hire the union applicants. To avoid considering or hiring the union applicants, the Company responded in a particularly swift manner. It

immediately changed its hiring policy in a manner that precluded any unsolicited applications, and immediately began using temporary employment agencies and subcontractors for all of its staffing needs.

The Company's argument that its conduct was not unlawful rests primarily on challenging the Board's inferences drawn from undisputed evidence--an argument that carries little weight. For instance, the Company disputes the Board's finding that journeyman plumber Harper, who engaged in a wide variety of coercive conduct, including making clear that President Foley would not tolerate a union, was an agent whose coercive conduct was imputable to the Company. Given that Harper admittedly served as Foley's "extension" on jobsites, and that employees were told to, and did, report to Harper, the Board was fully warranted in finding that Harper was an agent, and that his coercive conduct was therefore unlawful.

Similarly, the Board's finding that the Company violated the Act when it changed its hiring policy is built upon a foundation of undisputed evidence. The Company does not dispute that its hiring policy was changed in response to the union applicants--requiring that all unsolicited applicants apply offsite through a State agency. Nor does it dispute that it implemented the change in a manner that effectively precluded any unsolicited applicant from applying for work with the Company--failing to provide the State agency with a job order for several months.

Accordingly, the Board reasonably found that the Company acted unlawfully when it implemented the change.

In light of the Company's contemporaneous unfair labor practices, its sudden change in hiring policy, and its sudden use of temporary employees, the Board was also fully warranted in finding that the Company's refusal to consider or hire the union applications was unlawfully motivated. Moreover, the Company's use of temporary employees over an approximately 8-month time period, and its subsequent hiring of five journeymen plumbers, strongly supports the Board's finding that the Company would have hired the union applicants absent antiunion animus.

In attacking the Board's finding that the Company's defense--that a compressed schedule of projects required the use of temporary employees--was a pretext, the Company once again simply disputes the inferences drawn by the Board from undisputed evidence. The Company failed to explain why the need to exclusively use temporary employees coincided with the receipt of the applications from the union members. Given that failure, and the undisputed evidence that the Company used temporary employees for an extended time period, the Board reasonably found that the Company's assertion was merely a pretext to avoid hiring the union members.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a) (1) OF THE ACT BY THREATENING EMPLOYEES WITH VARIOUS REPRISALS IF THEY SELECTED THE UNION AS THEIR BARGAINING REPRESENTATIVE, INTERROGATING EMPLOYEES ABOUT THEIR UNION ACTIVITIES, AND CHANGING ITS HIRING POLICIES IMMEDIATELY AFTER UNION MEMBERS APPLIED FOR EMPLOYEMNT

A. Conduct that Reasonably Tends To Interfere with Employees' Section 7 Rights Is Coercive and Therefore Unlawful; the Coercive Conduct of Its Agents Can Be Imputed to an Employer

Section 7 of the Act (29 U.S.C. § 157) guarantees employees "the right to self-organization, to form, join or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) implements that right by making it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of those Section 7 rights. *See Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946, 952 (D.C. Cir. 1988).

In determining whether an employer has violated Section 8(a)(1), the Board does not consider "whether an employee actually felt intimidated but whether the employer engaged in conduct which may reasonably be said to tend to interfere with the free exercise of employee rights under the Act." *Teamsters Local Union No. 171*, 863 F.2d at 954. In making that assessment, the Board is guided by "the

totality of the circumstances." *Tasty Baking Company Co. v. NLRB*, 254 F.3d 114, 123 (D.C. Cir. 2001). The Board "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

Coercive conduct can be imputed to the employer if an individual is acting as the employer's agent. Under common law principles of agency, apparent authority "exists where the principal engages in conduct that 'reasonably interpreted, causes the third person to believe that the principal consents to have the acts done on his behalf by the person purporting to act for him'" and where the principal either "'intend[s] to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief.'" *Overnite Transportation Company v. NLRB*, 140 F.3d 259, 265 (D.C. Cir. 2001) (*quoting Restatement (Second) of Agency § 27* (1992)).

A reviewing court must recognize "the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship." *Perdue Farms, Inc., Cookin' Good Div. v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998) (internal quotation marks omitted). The Board's findings that an individual is an agent (*Overnite Transportation*, 140 F.3d at 265),

as well as its findings that conduct is coercive (*Perdue Farms*, 144 F.3d at 834-35), are entitled to affirmance if supported by substantial evidence, even though the reviewing court would have reached a different result if it had considered the question *de novo*. *See generally, Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). It is also settled that the Court "'must accept the [administrative law judge's] credibility determinations. . . , as adopted by the Board, unless they are patently unsupportable.'" *Tasty Baking,* 254 F.3d at 123 (*quoting Gold Coat Rest. Corp. v. NLRB*, 995 F.2d 257, 265 (D.C. Cir. 1993)).

B. Company Employee Harper Was a Company Agent Who Unlawfully Interrogated and Threatened Employees

An employer violates the Act by interrogating employees about union activities, threatening to close a facility if employees vote for union representation, and threatening to refuse to bargain in good faith with the duly certified union. *See Teamsters Local Union No. 171*, 863 F.2d at 953. As shown above (pp. 7-8, 13), journeyman plumber Harper interrogated employees Brown and Mitchell, and told employees Mitchell, Brown, and Howard that President Foley would retaliate against employees if the Union won the election. The Company did not except to the judge's finding that Harper's conduct was coercive, or that his conduct violated the Act if it was imputable to the Company. (A 7-10.)

The Company's assertion (Br 23-25) now that Harper's coercive conduct did not violate the Act even if his conduct was imputable to the Company is inappropriate. Its failure to except to the judge's findings on that ground bars the Company from raising that claim in this Court. *See* Section 10(e) of the Act (29 U.S.C. § 160(e));[3] *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (court of appeals lacks jurisdiction to consider issues not properly raised before Board); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 310 F.3d 209, 216-17 (D.C. Cir. 2002) (same). Accordingly, as long as substantial evidence supports the Board's finding (A 10-11) that Harper's coercive conduct was imputable to the Company, his threats to employees about the impact of unionization, and his interrogations of them, were unlawful.

Here, the record evidence amply supports the Board's finding (A 10-11) that the Company's actions could reasonably lead employees to believe that Harper was speaking and acting for management. To begin with, President Foley described Harper as an "extension of [him] at the jobsite." (A 10, 11, 16; 39, 109.) The Company also provided Harper with business cards that classified him as a "project manager." (A 16; 46-51, 55-56, 420-22.) The undisputed evidence set

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[3] Section 10(e) provides in relevant part: "No objection that has not been urged before the Board . . . shall be considered by the court," absent extraordinary circumstances. The Company has not alleged any extraordinary circumstances.

forth by the judge (A 16 and n.15) confirms that Foley conferred apparent authority on Harper: (1) Foley told employees that they should report to Harper at particular job sites and direct all questions and problems to him; (2) Foley specifically told Mitchell and Howard that Foley was their supervisor; and (3) the employees did, in fact, report to Harper at company jobsites. (A 152-60, 163, 180-87, 202-06, 215-23, 280-83, 286-91, 423-94.) Further confirming Foley's grant of apparent authority to Harper, the employees observed Harper primarily perform management-type tasks, such as making sure that work was performed on time and properly, and dealing with other contractors on the jobsite. (A 16; 154-57, 182-87, 217-19, 221-22, 281-85.)

Given Harper's undisputed role as President Foley's "extension" on jobsites, the employees, as the Board explained (A 11), "could reasonably believe" that when Harper threatened employees regarding the consequences of unionization, and interrogated them about their union activities, he was "transmitting management's views" and acting for management. (A 11.) *See Poly-America, Inc. v. NLRB*, 260 F.3d 465, 480-82 (5th Cir. 2001) (leadmen have apparent authority because they assign jobs to remainder of crew, oversee their work, and act as conduits for relaying policy and other communications from management); *Delta Mechanical, Inc.*, 323 NLRB 76, 77-78 (1997) (that employer told employees that a fellow employee was their leadman, and the leadman's

direction of work, supports agency finding); *Victor's Café 52*, 321 NLRB 504 n.1 (1996) (communication of management's views and directives indicates apparent authority). Accordingly, the Board was fully warranted in concluding (A 11) that in Harper's capacity as a company agent his uncontested coercive conduct violated Section 8(a)(1) of the Act.

The Company (Br 21-23) does not help itself by erroneously asserting that Harper could not be its agent unless he also was its supervisor. It is settled that "an employee's actions may be imputed to his company regardless of supervisory status where the company places an employee in a position which reasonably fosters the appearance and belief that he acts on behalf of the management." *NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679, 688 (7th Cir. 1982) (employee was agent, in part because he "advertised" himself as a vice president to customers and coworkers). *Accord NLRB v. Thermon Heat Tracing Services, Inc.*, 143 F.3d 181, 185-86 (5th Cir. 1998) (employee who was responsible for maintaining a safe work environment was an agent of the employer despite not being a supervisor.)

C. Company Agent Payne Threatened the Company's Employees

As an initial matter, substantial evidence supports the Board's finding (A 16) that Jeffrey Payne, President Foley's friend and fellow contractor, was acting as the Company's agent when he referred to those company employees who wore

union T-shirts as "targets." President Foley introduced Payne as a speaker during a captive audience meeting held to persuade employees to vote against the Union, and failed to disavow any of Payne's comments. Such circumstances could reasonably lead the employees to believe that Payne was speaking and acting for management when he addressed the employees. Accordingly, the Board was fully warranted in finding that Payne was an agent of the Company.

Substantial evidence also supports the Board's finding that agent Payne's reference to employees as "targets" because they wore union T-shirts would have a tendency to coerce employees. By singling out the obvious union supporters as "targets," Payne's message, as the Board explained (A 11), "was clear--if you show support for the Union, you will become a target for reprisal." Accordingly, the Board was fully warranted in concluding (A 11) that Payne's remark implicitly threatened reprisals against employees who wore union T-shirts.

Although the Company asserts (Br 25-26) that Payne did not refer to union supporters as "targets" during his address, it has offered no basis for overturning the judge's decision, upheld by the Board, to credit employee Baker's testimony that Payne made the remark. (A 10 n.1, 11, 14, 16; 230.) That decision was well founded given that employees Brown (A 172-74) and Mitchell (A 198) substantially corroborated Baker's testimony. Moreover, Payne's concession that at the representation hearing he disparaged employees who wore union T-shirts

lends credence to the credited testimony that Payne later again made an issue of the union T-shirts. (A 14 n.10; 343-46.)

There is no merit to the Company's contention (Br 26) that the Board erred in finding that Payne was an agent of the Company when he made his threat. The only defense that the Company offers to the Board's finding is that Payne was not an employee at the time he made the remark. The Board reasonably inferred, however, that President Foley's sponsorship of Payne's presentation to the employees would lead them to believe that Payne was speaking on behalf of the Company--regardless of whether he was one of its employees. The Board's inference is reasonable and, therefore, must be upheld. *See Tasty Baking*, 254 F.3d at 123.

Finally, the Company's reliance (Br 26) on *Microimage Display v. NLRB*, 924 F.2d 245, 255 (D.C. Cir. 1991) does not advance the Company's argument that Payne's remark did not constitute a threat. That case simply stands for the well-settled proposition that an employer does not violate the Act when it expresses views about unions that are unaccompanied by threats. Here, the Board did not find that all of Payne's remarks about unions violated the Act. Rather, the Board found that, within those lawful remarks, he made one remark that constituted an implicit threat.

D. President Foley Threatened Employees with Loss of Benefits

An employer violates Section 8(a)(1) by threatening employees with loss of benefits if they choose union representation. *See McLane/Western, Inc. v. NLRB*, 723 F.2d 1454, 1455 (10th Cir. 1983); *NLRB v. General Stencils, Inc.*, 438 F.2d 894, 903 (2d Cir. 1971). *See also Avecor, Inc. v. NLRB*, 931 F.2d 924, 931 (D.C. Cir. 1991) (employer acts unlawfully when it threatens to penalize employees if they choose union representation). For an employer's statement to be deemed a prediction rather than a threat, it must be "a carefully phrased prediction, based on objective facts beyond the employer's control, which only convey an employer's belief as to the demonstrably probable consequences of unionization." *Midwest Regional Jt. Bd., Amalgamated Clothing Workers of America v. NLRB*, 564 F.2d 434, 444 (D.C. Cir. 1977). Moreover, "the line between prediction and threat is a thin one, and in the field of labor relations that line is to be determined by context and the expertise of the Board." *Timsco, Inc. v. NLRB*, 819 F.2d 1173, 1178 (D.C. Cir. 1987).

Here, substantial evidence supports the Board's finding (A 14 and n.7, 16, 25) that President Foley threatened employees with a loss of benefits when he told employee Howard that in a "union setting" the employees would have to drive their own vehicles to a jobsite and would not receive pay for travel time. That Foley made the remark is clear from the record. (A 380-82, 384-87.) Indeed, the

Company does not dispute that Foley made the remark. As the Board explained (A 16), "[t]he import of [Foley's] remark was that if the Union won [the election] [the Company] would no longer allow employees to drive company vehicles to work . . . ." Accordingly, the Board was fully warranted in finding (A 16) that Foley threatened employees with loss of benefits if the Union won the election.

There is no merit to the Company's contention (Br 27) that President Foley did nothing more than provide employee Howard with a prediction based on the benefits contained in other union contracts. The Company provides no evidence that it was beyond the Company's control to continue its benefit of allowing employees to drive company vehicles to and from work. Accordingly, Foley's statement went beyond the mere probable consequence of unionization, and instead implicitly threatened employees that he would eliminate a benefit if the employees selected union representation.

E. The Company Changed Its Hiring Practices To Restrict Union Applicants

An employer violates Section 8(a)(1) of the Act by changing its hiring practices to restrict receipt of employment applications from prounion applicants. *See Starcon, Inc*., 323 NLRB 977, 982 (1997), *enf. in pertinent part*, 176 F.3d 948, 949-50 (7th Cir. 1999). *See also Tualatin Electric*, 319 NLRB 1237, 1237 (1995). Here, the Company does not dispute that, one day after the Company received

applications from the six union members, it stopped accepting unsolicited applications, and began requiring that unsolicited applicants apply offsite through Indiana Workforce. Nor does it dispute the Board's finding (A 14) that the change was implemented "in reaction to the visit by the union applicants," and to "prevent reoccurrence of such a visit." Moreover, the Company does not dispute the Board's conclusion (A 14) that the Company's new offsite application policy would severely restrict union applicants' ability to apply and thereby attempt to organize the Company. Accordingly, the Board was fully warranted in finding (A 15-16) that the Company violated the Act when it instituted the change.

The Company cannot support its claim (Br 29-30) that the rudeness of the union applicants, and their disruptiveness to the Company's business, led it to change its application process. That contention is fatally undermined by the way the Company implemented the change. The Company did not simply send future unsolicited applicants offsite, but it effectively precluded them from applying for employment. Because the Company did not submit a job order to Indiana Workforce for almost 3 months after instituting the change, no unsolicited applicant could even apply to the Company through the agency, much less obtain employment. (A 24 and n.3; 243-47, 250-53, 582-83.) Indeed, it was not until November 17, precisely 2 months after the Union lost the representation election, that the Company sent its first job order to Indiana Workforce.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY REFUSING TO CONSIDER OR HIRE SIX APPLICANTS BECAUSE OF THEIR UNION AFFILIATION

A. An Employer Violates the Act by Refusing To Consider or Hire an Applicant Because of the Applicant's Union Activities

An employer violates Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by refusing to hire or consider for hire applicants because of their union sentiments, membership, or activities. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185 (1941); *Cobb Mechanical Contractors, Inc. v. NLRB*, 295 F.3d 1370, 1375 (D.C. Cir. 2002). Accordingly, when a union has its members seek employment with the intent of organizing the employer's work force, a process known as salting, the union members are entitled to protection under the Act. An employer violates the Act if it refuses to hire or consider for hire the applicants simply because they are union salts. *See NLRB v. Town & Country Elec.*, 516 U.S. 85, 87-88, 98 (1995); *Willmar Elec. Service, Inc. v. NLRB*, 968 F.2d 1327, 1329-31 (D.C. Cir. 1992).

The Board's familiar burden-shifting analysis developed for discriminatory discharge cases (*see Wright Line*, 251 NLRB 1083 (1980), *enf. on other grounds*, 662 F.2d 899 (1st Cir. 1981), *and approved in NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983)) is also applied in discriminatory refusal-to-consider/hire cases. In *FES*, 331 NLRB 9 (2000), *enf.*, 301 F.3d 83 (3d Cir.

2002), the Board reconsidered and clarified the elements required to establish a discriminatory refusal to hire and refusal to consider for hire.

To establish a refusal to consider for hire, the record must show: (1) the employer excluded the applicant from the hiring process, and (2) that antiunion animus contributed to the decision not to consider the applicant. *See FES*, 331 NLRB at 15. To establish a refusal to hire, the record must show: (1) that the employer was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. *Id.* at 12-13.[4]

If these criteria are established, the burden then shifts to the employer to demonstrate by a preponderance of the evidence that it would have taken the same action--not hired the applicants, or considered them for hire--even absent the

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[4] Because there is no requirement that a job opening exist to find a refusal-to-consider violation, the remedies for the two violations differ. A refusal-to-consider violation warrants an order requiring the employer to cease and desist from the unlawful discrimination, and to notify and consider the applicants for

applicants' union activities or affiliation. If the employer meets its burden, the Board will not find a violation. *Id*. at 12-13, 15.

Motive is a question of fact, and the Board may rely on circumstantial as well as direct evidence to establish the employer's motive. *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 228 n.5 (D.C. Cir. 1995); *Power, Inc. v. NLRB*, 40 F.3d 409, 418 (D.C. Cir. 1994). Recognized circumstantial indicia of unlawful motive include the employer's awareness of the employees' union affiliation and activity, and the employer's demonstrated antiunion bias. *See Avecor, Inc. v. NLRB*, 931 F.2d 924, 929 (D.C. Cir. 1991); *Southwest Merchandising Corp. v. NLRB*, 53 F.3d 1334, 1342-43, and n.11 (D.C. Cir. 1995).

In addition, the Board may infer unlawful motive from the contrived or implausible nature of the employer's proffered reasons for its action. *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1169 (D.C. Cir. 1993); *Avecor, Inc.*, 931 F.2d at 929. "'[T]he absence of any legitimate basis for an action'--i.e., the absence of a credible explanation from the employer--'may [also] form part of the proof of the General Counsel's case.'" *Southwest Merchandising Corp.*, 53 F.3d at 1340 (*citing Wright Line*, 251 NLRB at 1088 n.12). Thus, where an employer's stated reason for its action is found to be pretextual, the Board "may not only

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future openings. A refusal-to-hire violation warrants the same order, as well as, back pay and instatement. *FES*, 331 NLRB at 14, 16.

properly infer that there is some other motive, but 'that the motive is one that the employer desires to conceal--an unlawful motive--at least where the surrounding circumstances tend to reinforce that motive.'" *Laro Maintenance Corp.*, 56 F.2d at 226 (*quoting Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966)), and cases cited.

In reviewing the Board's decision, the Court, as shown above pp. 19-20, gives substantial deference to the Board's findings of fact and credibility determinations, upholding its factual determinations if they are supported by substantial evidence on the record as a whole, and upholding its credibility findings absent extraordinary circumstances. Moreover, the Court's review of Board determinations with respect to motive, a matter within the Board's special expertise, "is even more deferential." *Laro Maintenance Corp.*, 56 F.3d at 229.

As we now show, ample evidence supports the Board's finding in its initial decision that the Company unlawfully refused to consider the union-affiliated applicants for hire, and the Board's finding in its supplemental decision that the Company unlawfully refused to hire them.

B. The Company Refused To Consider or Hire the Union Applicants

1. The Board reasonably found that the factors required to establish refusal to consider and hire violations were present

To begin with, ample evidence exists that the two factors necessary to support a finding that the Company unlawfully refused to consider the six union members for employment--exclusion from the hiring process and evidence of antiunion animus--are present here. First, the Board's finding (A 15, 21) that the Company knew the applicants were union members is not in dispute. Indeed, they made sure that the Company knew of their union status by writing "voluntary organizer" on their applications, and by wearing union T-shirts to the Company's office when they applied. Moreover, armed with knowledge of the applicants' union activity, President Foley conceded (A 21, 24; 82, 86) that the Company did not consider them for employment, making no effort to contact or interview them. In those circumstances, the Board was fully warranted in finding (A 10, 15, 20) that the Company had excluded the applicants from the Company's hiring process.

Second, the Board reasonably concluded (A 10, 15, 21) that antiunion animus motivated the Company's failure to consider the union applicants for employment. The Company's numerous contemporaneous unlawful threats and interrogations support a finding of animus. *See Frazier Indus. Co, Inc. v. NLRB*, 313 F.3d 750, 756 (D.C. Cir. 2000). Moreover, the specific circumstances

surrounding the Company's handling of the application process virtually compel a finding of unlawful motivation.

As shown above, pp. 10-11, 14, 27-29, the Company responded swiftly to the attempt by the union members to seek employment with the Company. Initially, the Company unlawfully changed its hiring policy to effectively preclude any other union applicants from submitting applications to the Company. Thereafter, to effectively preclude the union applicants who had already applied from being considered, the Company suddenly began using temporary employment agencies and subcontractors for all of its staffing needs, resuming direct employment only when the applications from the union members were no longer valid. These circumstances--the contemporaneous unfair labor practices, the sudden unlawful change to the Company's hiring policy, and the sudden use of temporary employees--provided the Board with ample reason to conclude (A 15) that antiunion animus motivated the Company's refusal to consider the union applicants for employment.

There is also ample evidence that that the Company unlawfully refused to hire the six union applicants. The evidence shows that the two other necessary factors to find a refusal-to-hire violation are present here--evidence that the Company was hiring, and evidence that the union members were qualified for positions with the Company.

First, the Company does not dispute that it had increased labor needs at the time it received the union applications. Indeed, as shown above, p. 11, within the 30-day shelf life of the union applications, the Company employed at least 14 employees from temporary agencies, including at least 4 journeymen and at least 3 apprentices. Second, the applicants were qualified to meet the Company's labor needs. As the Board found (A 26), "[e]ach of the six applicants had extensive experience and training in the plumbing trade." Indeed, all of the union members were licensed journeymen plumbers with a minimum of 5 years plumbing experience. (A 231, 259-60, 264-65, 293-94, 302-03, 315-16.) In these circumstances, the Board was fully warranted in concluding that the Company had unlawfully refused to hire the union members.

2. The Board reasonably found that the Company's use of temporary employees was a pretext to avoid considering or hiring the union members

The Company failed to establish its defense (Br 15-16) that it was not hiring permanent employees at the time the union applicants applied, because it was instead relying exclusively on temporary employment agencies for it staffing needs. According to the Company, the use of temporary employment agencies was justified because it was performing several jobs on a "compressed schedule" in which the use of temporary staffing saved the Company training costs, and meant that it could avoid laying off permanent employees when it completed the

jobs. The Board reasonably found (A 15, 21), however, that the circumstances surrounding the Company's use of temporary employees demonstrates that their use was a pretext.

Supporting the Board's pretext finding, as the Board explained (A 21), was the Company's failure to offer any "explanation as to why the advantages of using a temporary agency to hire temporary employees became so determinative for all of its hiring needs shortly after the six union applicants applied for positions." For example, the Company did not show that it acquired the short-term jobs within hours of receiving the union applications, or explain why the advantages of exclusively using temporary employees were not apparent prior to receiving those applications. Moreover, the Company has offered no evidence that the ultimate length of those jobs--at least 6 months (A 123-24)--was significantly different than other jobs on which the Company had not used temporary employees for its staffing needs. The Board's further uncontested finding (A 26 n.9; 473-75, 478, 490)-- that company records indicate that the Company was "actively seeking labor and was having some trouble finding it after the [union] members applied for work"--confirms that it could have employed the union applicants.

In addition to not explaining the sudden need for exclusive reliance on temporary staffing, the Company also failed to establish its claim (Br 15-16) that it used temporary staffing in order to prevent future layoffs of any new permanent

hires. Indeed, the following demonstrates that the Company had sufficient work to keep the union applicants on its payroll: (1) the Company used temporary employees over an 8-month time period, from August 1997 to March 1998 (A 594-95); (2) starting in late 1997 and continuing through the spring of 1998, it permanently hired at least three journeymen through Indiana Workforce; and (3) that it directly hired two journeymen. (A 24). The uncontested Board finding (A 24 n.5) that at least some of the Company's hiring "appears to correlate" with the end of a temporary employee's tenure similarly shows that the Company had a long-term need for additional staff.[5]

Finally, the Company's failure to provide any evidence to support its claim (Br 16) that the use of the temporary employees saved it money and training costs, further supports the Board's pretext finding. That is particularly true here, where the Company failed to explain why it would have incurred significant training costs had it employed the highly experienced union members.

The Company does not help its position by asserting (Br 15) that it had contacted two of the temporary employment agencies the day before the union members applied. Indeed, by then it had already engaged a consulting company to

[5] The Company's citation (Br 15) to *Starcon, Inc. v. NLRB*, 176 F.3d 948 (7th Cir. 1999), is surprising. There, the Board and the Seventh Circuit found that, like here, the employer used contract labor as a pretext to avoid hiring union applicants. *Id*. at 949-50.

assist it in its campaign against the Union. The Company thus was well aware of the union campaign when it contacted those temporary agencies. As the Board reasonably inferred (A 15), the Company might well have anticipated a "salting attempt."

Likewise, the Company's reliance (Br 15) on its use of temporary employment agencies in the past, does not overcome the Board's reasonable finding that the Company's use of those agencies on an exclusive basis immediately after the union members applied was a pretext. Indeed, given the undisputed Board finding (A 14; 590-91) that the Company had only occasionally used temporary employees over the prior 3 years, and had never used temporary employees on the scale used here, the Company's prior use of some temporary employees proves little.

There is also no merit to the Company's attack on the Board's finding that the union members were qualified for jobs with the Company. The Company's assertion (Br 11)--that its alleged need for plumbers with at least 8 years overall experience, as well as some specific experience in residential service work, justified not hiring the union applicants--is undermined by four crucial uncontested factual findings or inferences. First, the Board found (A 21, 26 n.10) that four of the union applicants had more than 8 years of plumbing experience. Indeed, two applicants had more than 8 years experience as journeymen, and two

others had substantial expertise as journeymen. (A 264-65, 293-94, 302-03, 315-16) Second, the Board found (A 21, 26 n.10) no evidence that those hired by the Company met the 8-year requirement. Third, the Board found (A 21, 23-24) that three of the union members had experience in residential/service work. (A 269-70, 308-09, 319-20.) Fourth, the Board reasonably inferred (A 21, 26) that the three union members who did not have residential or service experience would have qualified for positions with the Company on its approximately one dozen ongoing commercial projects (A 37-38, 52-54, 152-55), where the evidence reflects that the Company used much, if not all, of the temporary labor (A 64-66, 111-12).

The Company's additional claim (Br 16-20) that the union applicants were not legitimate applicants lacks legal and factual support. It is well settled, under *NLRB v. Town and Country Elec.*, 516 U.S. 85, 87-88, 98 (1995), that "salts" are legitimate applicants. The Company cites no authority to support its suggestion that the union members' attempt to secure employment that pays less than union scale disqualifies them as bona fide applicants. *Cf. Contract Labor Pool, Inc.*, 335 NLRB No. 25 (2001) (application for enforcement pending, No. 01-1393 (D.C. Cir.) (oral argument scheduled for February 11, 2003 before Judges Edwards, Rogers, and Silberman)) (inherently destructive for employer to refuse to hire applicants because of their prior union wages).

Moreover, there is no merit to the Company's contention (Br 17, 18, 19, 20) that the union applicants would not have accepted employment with the Company. The administrative law judge noted (A 23) that all of the union members testified that they would have taken jobs if offered. (A 235, 259, 267-68, 297, 308, 319.) The Company failed to demonstrate that their testimony that they would have accepted employment with the Company was "incredible." All of the union members were interested in organizing the Company. Moreover, none of the applications made a specific salary demand, and four specifically indicated that any salary was acceptable. (A 23-24, 27; 537-55.) Finally, four of the union members were unemployed at the time they applied to the Company, and three had worked for and/or applied to nonunion employers in the past. (A 23-24; 235-36, 264-65, 267, 269-70, 302-04, 306-07, 311-14, 318.)[6]

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[6] The Company's claim (Br 17) that Stockton was employed when he applied for work with the Company is misleading. Stockton was eligible for recall at an employer, but had been on layoff from that employer for 6 months. (A 235-36.)

III. BECAUSE THE BOARD CHOSE TO DIRECT A SECOND ELECTION, RATHER THAN ISSUE A BARGAINING ORDER, THE COURT MAY COMPLETELY DISREGARD THE COMPANY'S ASSERTION THAT THE BOARD ERRED BY ISSUING A BARGAINING ORDER

The Court can completely disregard the Company's assertion (Br 27-30) that the Board acted inappropriately by ordering the Company to bargain with the Union. The Board did not impose a bargaining-order remedy. Rather, the Board, in agreement with the administrative law judge (A 21, 27), specifically directed a second election, finding an insufficient basis to impose a bargaining order.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's order in full.

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